

DEPARTMENT OF STATE REVENUE

04-20140620.LOF

Letter of Findings Number: 04-20140620
Sales/Use Tax
For Tax Years 2011 - 2013

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail business that failed to properly keep records and documentation did not meet its burden of proof regarding its protest.

ISSUES**I. Sales/Use Tax—Record Keeping.**

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; [IC 6-2.5-3-2](#); IC § 6-2.5-4-1; IC § 6-2.5-1-2; IC § 6-2.5-5 et seq.; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Wendt LLP v. Indiana Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); [45 IAC 2.2-8-12](#).

Taxpayer protests the proposed assessment of sales/use tax.

II. Tax Administration—Penalties and Interest.

Authority: IC § 6-8.1-10-2.1; IC § 6-8.1-10-1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of penalties and interest.

STATEMENT OF FACTS

Taxpayer is a retailer operating a convenience store that sells gasoline. Taxpayer is incorporated and elected to file as an S-corporation. The Indiana Department of Revenue ("Department") conducted an audit for sales and use tax, among other taxes that were audited, which resulted in proposed assessments of tax. Taxpayer protested and an administrative hearing was held; this Letter of Findings results. More facts will be provided as needed below.

I. Sales/Use Tax—Record Keeping.**DISCUSSION**

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in

Indiana unless a valid exemption is applicable. IC § 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

As noted, sales tax is imposed by IC § 6-2.5-2-1:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail. (Emphasis added).

Also, the Department refers to IC § 6-8.1-5-4(a), which states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).

Therefore, all taxpayers subject to a listed tax must keep books and records such as, but not limited to, invoices, register tapes, receipts, and cancelled checks, as provided by IC § 6-8.1-5-4-(a). If the Department reasonably believes that a person has not reported the proper amount of tax due, the Department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department, as provided by IC § 6-8.1-5-1(b).

The Department conducted a sales and use tax audit for the years at issue. The audit report initially notes:

Per [45 IAC 2.2-6-8](#), the retailer is to report all taxable transactions regardless of the amount of sales tax collected. Per [45 IAC 2.2-7-3](#), retail merchants are to collect the sales tax on gasoline sold through a metered pump. Also per [IC 6-2.5-7-5](#), the retail merchant is allowed to deduct the portion of sales tax previously paid to the vendor.

Regarding gasoline, the audit report states that "[n]o cash register tapes or source documentation were provided to substantiate these daily sales reports." For non-metered sales, the audit report states that "[w]ithout documentation, the reported 1120S Cost of Goods Sold (COGS) and industry percentages were used to determine if any adjustment to total NM [non-metered] sales existed." The auditor also stated that under [45 IAC 2.2-8-12](#) exempt sales have to be documented. The auditor noted, "Without any documentation of the exempt NM sales, none have to be allowed." The auditor, however, did allow 5 percent exempt sales. Auditor also found other problems, there were price discrepancies regarding price per gallon, also "in 14 of the 36 months, the gallons sold do not match the recapped gallons," and for use tax "[t]he taxpayer failed to provide any general ledgers or purchase invoices."

Turning to Taxpayer's protest, Taxpayer states:

The Audit basically consists of two parts the Retail Sales of Gasoline or Metered Pump Sales and the sales of Non Metered Pump Sales The auditor significantly increases the total sales by using ratios that in our opinion do not apply to this location in this section of the state a more accurate reflection of our sales will be

the deposits made by the entity to its bank accounts.

Taxpayer provided copies of banking information:

If you were to review the Exhibits . . . you would see that the deposits into the bank account consists of three (3) basic categories []. We have food stamps deposited into the account, there is Money Grams deposited into the account, and finally the reimbursement from the tobacco companies are deposited into the account.

Taxpayer next takes issue with the 5 percent exempt sales granted by the auditor:

An arbitrary [sic] amount of five (5) per cent [sic] was used by the auditor and if you were to examine the Exhibits . . . you would see that the Food Stamp Sales alone are between fifteen (15) and Sixteen (16) percent. This is only Food Stamps credit should also be give [sic] for those customer [sic] who do not participate in the Food Stamp program who stop by on their way home from work and buy a gallon or two of milk and a loaf or two of bread so in reality the percentage should be at the very least eighteen (18) percent of sales.

Lastly, regarding Metered Pump Sales, Taxpayer states "we will accept the adjustments on the Gas Metered pump sales."

Regarding Taxpayer's bank statements, the deposits portion of it presumes that it represents all sales. However without source documentation there is no way to verify this, and instead Taxpayer's bank deposits presents at best a partial view. Additionally, Taxpayer's protest fails to cite to any statutes, regulations, or cases. The Department finds that Taxpayer has not presented a sufficiently developed argument for the Department to address. See *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 485 n.9 (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (quoting *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010)).

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Penalties and Interest.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty. Interest is imposed pursuant to IC § 6-8.1-10-1, and the Department notes that waiver of interest is not permitted under IC § 6-8.1-10-1(e). The waiver of the penalty is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty

assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.
(Emphasis added).

Taxpayer failed to properly keep records as required by law. As noted by [45 IAC 15-11-2\(b\)](#), "Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence." Taxpayer has not established reasonable cause, thus its protest of the penalty is denied.

FINDING

Taxpayer's protest of penalties and interest is denied.

SUMMARY

Taxpayer's protest of the audit is denied. Taxpayer's protest of penalties and interest is also denied.

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An [html](#) version of this document.